IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 574

ALEX MAZY,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden Illinois State Penitentiary, Stateville, Illinois,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 149 Fed. (2) 948.

STATEMENT OF THE CASE.

The warden of the Illinois State Penitentiary (respondent below, appellant here) appealed to the United States Circuit Court of Appeals for the Seventh Circuit from an order of the District Court for the Northern District of Illinois discharging petitioner, Alex Mazy, from respondent's custody. (*Memorandum, Findings, Conclusions and Order,* Tr. 69.) The order appealed from was entered on May 11, 1944. (Tr. 68.) Notice of appeal was filed on June 30, 1944, after the certificate of probable cause was issued. (Tr. 77.) (Tr. 76.)

The Circuit Court of Appeals reversed the decision of the District Court for the reasons set forth in its opinion.

Petitioner Did Not Exhaust Any of His Remedies in the State Courts.

Petitioner made no attempt to assert in any State court, by any type of proceeding whatever, any of the contentions to which the District Court acceded in setting him free.

The Leading Facts.

Although the record in this case was eighty-three pages in length in the Circuit Court of Appeals, the salient facts can be briefly stated. They are not in dispute and almost all of them appear succinctly in the "*Memorandum, Findings of Fact, Conclusions of Law and Order*" of the district judge. (Tr. 69-74.) The facts are not in dispute and respondent accepts the findings of fact.

The petitioner admittedly committed the crime of armed robbery on June 14, 1927, in St. Clair County, Illinois. (Tr. 69.) Because petitioner's counsel may argue that due process requires this court to attend to considerations of "substantial justice" and because petitioner implies that his punishment is "cruel and unusual" within the federal constitutional inhibition against such punishment, we deem it proper to make the following statement concerning the nature of his offense:

Petitioner and an accomplice named Garrett employed one Edward Bien, a taxi driver of Bellwood, to drive them into the country. After they had proceeded a short distance, Garrett pulled a gun and ordered Bien to "stick them up." (Tr. 61.) Bien resisted, and petitioner "slugged" the victim. (Tr. 61.) Petitioner and his accomplice tied the victim securely and threw him from the car. (Tr. 61.)

In opposing petitioner's parole, the victim stated in 1938, eleven years after the crime, that his eyesight has been constantly "impaired to such an extent that I find it rather difficult to see" (Tr. 68) as a result of this merciless beating.

Having thus gravely and permanently injured the cab driver and relieved him of money and a watch, petitioner and his accomplice proceeded to rob another driver, proceeded to Carbondale, and stole another automobile. Reports of these robberies having preceded them, they were apprehended by police officers and in a gunfight petitioner was shot in the right arm, which was later amputated about seven inches below the shoulder. (Tr. 61.)

While petitioner was undergoing incarceration he "attacked an inmate with a knife because he was ridiculed." (Tr.62.)

On September 3, 1927, before petitioner had been arraigned or tried, a petition to inquire into the lunacy and insanity of the petitioner was filed in the Circuit Court of St. Clair County. (Tr. 15.) Counsel having been appointed as guardian *ad litem* for petitioner, the case was tried. The jury found the petitioner to be "insane and that such insanity occurred after the commission of the alleged crime." (Tr. 69.)

A judgment was entered by the court committing petitioner to the Hospital for the Criminally Insane at Menard, Illinois, there to remain "until restored and then to be returned to St. Clair County for trial." (Tr. 69.) In accordance with this judgment, petitioner was confined in the Chester State Hospital.

On September 26, 1927, an indictment was returned in St. Clair County charging him with robbery. (Tr. 69.) On April 23, 1928, petitioner was arraigned and on May 4th of that year, he was convicted by a jury and thereafter sentenced to a term of ten years to life. (Tr. 69.)

No jury was impaneled to determine whether the petitioner's sanity had been restored; there is no record in the Circuit Court of St. Clair County that any jury was impaneled to conduct such a hearing; and the records of the Circuit and County Courts of St. Clair County and the records of the similar courts at Chester, Illinois, "reveal that no adjudication of restoration to sanity of the petitioner was at any time made by any of said courts." (Tr. 70.)

In the argument, we shall show that it is at least fairly arguable the District Court overlooked the fact that **at the time in question,** the applicable statute expressly authorized the trial of petitioner **without** further judicial proceedings and vested authority to determine

sanity in the State Commissioners of Public Charities or their subordinates.

We contend that we are correct in our construction of the applicable Illinois statutes. But we further maintain that even if the question be regarded as a doubtful one, the mere presence of a doubtful question of Illinois statutory law deprives this case of that "clear and demonstrative" character which is requisite to access to the federal courts before exhaustion of state remedies.

This was recognized by the Circuit Court of Appeals which, as a further reason for reversing the judgment of the District Court, held that the instant case involved the construction of the Illinois statute, which construction raised a state or non-federal question rather than a federal one.

But respondent further contends that if it be conceded that petitioner was unlawfully convicted and sentenced because he was an adjudicated lunatic whose sanity had never been legally restored, then under applicable federal statutory provisions and authorities cited in the Argument, he is not entitled to his freedom and appropriate provision should have been made to authorize his return to the appropriate Illinois psychiatric institution.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals was correct for the reason given in the opinion, that petitioner failed to exhaust plain, speedy and adequate remedies in the courts of Illinois.

At the time that the District Court discharged the relator in the instant case and refused to certify probable cause for appeal, this court's decision in *White* v. *Ragen*, 324 U. S. 760, had not been decided. That important opinion was available, however, for the guidance of the Circuit Court of Appeals. In that case, this court held that a state prisoner who claims deprivation of liberty without due process of law must exhaust every reasonably available remedy afforded by the laws of the state, including application to this court for its writ of *certiorari*, before he may (at least under any ordinary circumstances) resort to a United States court.

Petitioner did not even assert the grounds urged here in his original petition; but the District Court permitted him to amend his petition, although no similar claims had ever been made in any state court.

Adequate remedy was available to petitioner under the law of Illinois.

If petitioner is correct in his position that his arraignment, trial, conviction and sentence were all absolutely and utterly void because there was an unreversed and undisturbed adjudication of his lunacy, presumably all that would have been necessary would have been a

motion addressed to the court, which had inadvertently caused these proceedings to be spread of record, for their expunction. It is of course settled beyond peradventure that a **void**, as distinct from a merely erroneous judgment order, may be expunged at any time. This is certainly the law of Illinois.

See *Thayer* v. *Village of Downers Grove*, 369 Ill. 334, for a clear statement of this axiom and a collation of authorities sustaining it.

Petitioner has made no such motion.

Moreover, if such a motion had been made and denied, a writ of error would have speedily corrected the erroneous judgment. In Illinois, as this court is aware from previous briefs and arguments in Illinois *habeas corpus* cases, a writ of error may issue at any time within twenty years after conviction. All that petitioner would have had to do would be to make the fact of his adjudication appear of record in the criminal conviction by a motion to expunge and if the motion should have been denied, sue out a writ of error. He would have been returned to the Illinois State Hospital for the Criminally Insane to await restoration to sanity by legal proceedings, arraignment and trial.

In the recent case of *People* v. *Brown*, 383 Ill. 287, a writ of error issued and judgment was reversed eleven years after conviction.

The Illinois statutory proceeding in the nature of a common law writ of error *coram nobis* was also available. The Illinois statute, which appears at Chapter 110, Par. 196, Ill. Rev. Statutes 1943, is as follows:

> "196. **(Correction of errors of fact in judicial records.)** The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the

> proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

It is true that it is a classical limitation on this proceeding that it lies only where matter does not appear of record but we anticipate no dispute upon the proposition that what is meant by "matter appearing of record" is "matter appearing of record in the case under the court's advisement at the time judgment is entered."

Courts do not take judicial notice, even of their own records, except the record in the proceeding in question.

Petitioner therefore could have made it appear of record in his criminal case that he was insane at the time of conviction and that the judgment was entered inadvertently.

Moreover, petitioner filed no petition for a writ of *habeas corpus* in the county in which he was convicted, nor after he filed such petition in the Supreme Court of Illinois has he ever sought *certiorari* from the Supreme Court of the United States.

The teaching contained in this court's decision in the recent case of *White* v. *Ragen,* 324 U. S. 760, is controlling in this respect. The decision of the Illinois Supreme Court was a decision by the highest court of the state. The petitioner in order to exhaust his legal remedies should have applied to the United States Supreme Court for a writ of *certiorari.* The adjudication by the

Illinois Supreme Court necessitated the presentation to this court of the federal question involved on *certiorari* or appeal from the state court decision. The availability of any remedy in the District Court thereupon turns upon such prior application to this court. It does appear that the grounds that he urged in support of either petition were not the same grounds that he urges here, since his principal argument in the trial court was that he was arbitrarily denied a pardon, a contention which the trial court decided adversely to him.

II.

Perusal of the Statutes applicable at the time indicate petitioner was properly subject to trial if he was found sane by administrative action without trial by jury. However, at best, construction of the Illinois statute raises a state or non-federal question rather than a federal one and is properly left to the determination of the state courts.

The Attorney General, in his desire to be fair to the petitioner, to his counsel and to this court, argues the considerations developed under this point in the belief, but not in absolute certainty, that they represent a correct and proper construction of certain applicable Illinois statutes. Although we believe, without being completely confident, that we are correct in these contentions, we advance them because, even if the question be deemed doubtful, or even if the court should be inclined to disagree with us, substantial uncertainty upon an important question of Illinois statutory law should constrain a federal court to forbear action when an authoritative and definitive adjudication could be elicited by simple and easy proceedings in the Illinois courts.

The following Illinois statutory provisions, which were in force at the time of petitioner's arraignment, trial and conviction are pertinent:

Paragraph 593 of Chapter 38, the Illinois Criminal Code, as it appears in the annotated statutes for the year 1927, the year during which petitioner in the instant case was tried and convicted, is as follows:

> "593. **Becoming insane.** A person that (*sic.*) becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all of these cases, it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of impaneling, insane or lunatic."

It will be observed that this statute, although it provides for a trial by a jury before a prisoner may be declared insane, is silent, at least so far as express provisions go, with respect to right to trial by jury on the issue of restoration to sanity.

But in 1927, there was in force a statute, which has since been amended. Section 22 of the Lunatics Act (Ill. Rev. Stats., 1927, Chap. 85, par. 22), which is quite long, provides in substance that authority to discharge patients from state institutions for the insane may be discharged by administrative action. No provision is made for trial in any court, either by jury or otherwise. The concluding text of this section is as follows:

> "* * * And no patient who has not recovered his reason or who is charged with crime shall be declared discharged until at least ten days after notice shall have been given to the judge of the county court having jurisdiction in the case, in order to enable the said judge to make some proper order as to the disposition of the said patient, when so discharged, which order shall be entered of record, and a copy thereof furnished to the superintendent, and to the State Commissioners of Public Charities."

The Attorney General is of the view that a proper construction of the provision of the Criminal Code quoted, *ante,* and the statutory provision quoted immediately above, when it is realized that in 1927, there was no provision for a trial by jury on an issue of *restoration* although there was clear and explicit provision for trial by a jury upon the issue of insanity supervening after the commission of crime and before trial, is that a person charged with crime and found to have become insane after the commission of the crime was properly subject to trial if he was found sane by administrative action, without trial by a jury.

If we are correct in this contention, then petitioner was lawfully convicted.

The cases of *People* v. *Scott,* 326 Ill. 327, and *People* v. *Preston,* 345 Ill. 11, relied on by petitioner to sustain his contention that the Illinois Supreme Court has given a settled construction to the statute afford him little comfort.

The determination that the prisoner was "restored to reason" was not before the court in the *Preston* case. The only issue presented and decided in that case was that the verdict returned by a jury in an insanity proceeding was subject to the inherent power of the court to set aside such verdict and order a new trial. It is true

that the court there said that the statute (Ill. Criminal Code, Ch. 38, par. 593, 1927, cited above) made the impaneling of a jury mandatory, but as indicated above, it is pertinent to note that the decision there is silent as to proceedings on the issue of *restoration* of sanity.

To be noted also is that both the *Preston* and *Scott* cases involved crimes which invoked capital punishment. The court in the *Scott* case expressly recognized and indicated the extent of its consideration by the following language found at page 337:

> "• • • The statute also provides for such a trial for a defendant after judgment and before execution, **in case the punishment be capital.** It is only the provision for the third trial that is material for consideration in this case, as the punishment fixed for the defendant was death by hanging. • • •"
> *(Emphasis Supplied.)*

Nowhere in that case can counsel for respondent find that one of the questions before the court was a construction of the statute as to whether the defendant was *entitled* to a jury trial upon the question of his restoration to sanity, as alleged by petitioner. (*Pet. Br.*, p. 23.) The defendant had had two trials below, one to determine his sanity, the second to determine restoration of reason. No question was before the court calling for a decision as to whether defendant was *entitled* to a trial by jury in the second instance. It is submitted here that the language of the court in the *Scott* case does no more than merely approve the procedure followed.

But the most that can be said upon the point in favor of the petitioner is that the question is a doubtful one of Illinois statutory law. It is of course well settled that federal courts will not take jurisdiction, particularly in cases involving *habeas corpus*, injunction or other extraordinary remedy, or, if they take jurisdiction,

will forbear the exercise thereof when the question is one of state statutory law and an authoritative adjudication can be elicited in the state courts.

If we are correct in our construction of this law, petitioner was properly remanded to the Illinois State Penitentiary. But if we are incorrect in our contention, and if it is further assumed that the Circuit Court of Appeals should have decided the question in favor of the petitioner instead of regarding it as doubtful and remanding him to the Illinois State Penitentiary, then clearly, as we shall show under Point III, *post,* petitioner is an adjudicated lunatic who has never been restored to legal sanity and the Circuit Court of Appeals instead of remanding such an adjudicated lunatic to the State Penitentiary, should have remanded him to the Illinois psychiatric custody.

III.

If the District Court had jurisdiction and if petitioner was imprisoned in the penitentiary under a void sentence, then the District Court, instead of discharging the prisoner, or the Circuit Court of Appeals, instead of remanding the prisoner to the Illinois State Penitentiary, should have returned him to confinement in the Illinois psychiatric hospital.

If it be assumed, for the sake of argument, that the District Court properly entertained the instant petition notwithstanding the failure of petitioner to exhaust his remedy in the Illinois courts and if it further be assumed that the prisoner was illegally convicted because he had not been restored to sanity, then it is clear, both under the federal statute immediately hereafter cited

and the authorities hereafter considered, that it was the duty of the court, instead of setting an adjudicated lunatic whose adjudication of lunacy had never been reversed at liberty, to give effect to the unreversed adjudication of lunacy and to restore him to the custody of the Illinois psychiatric authorities.

The significance lies in the question, not in the answer; for it makes no difference how the question is answered. If Mazy was not legally restored to reason, then he should have been remanded to the custody of the psychopathic institution from which he has been freed. But if he was sane and if, as petitioner contends, his trial was a nullity, he is now sane and if the District Court had jurisdiction to determine that fact, then by petitioner's own logic he is a person restored to reason who has never been lawfully tried upon an offense for which he has been indicted. He should therefore be remanded to the county in which he was indicted for trial.

Petitioner was indicted. Before he was convicted he was found to have become insane "after the commission of the crime." Thereafter he was pronounced sane by administrative action but was not restored to sanity by judicial proceedings. One, and only one, of the following alternatives is possible:

Either Mazy is still an adjudicated lunatic, in which case he should have been remanded to the appropriate Illinois psychopathic institution.

Or the administrative action was sufficient to restore him to sanity, in which case he was properly tried and convicted and should be remanded to the penitentiary.

Or the District Court had jurisdiction to determine that he is now sane, in which case he should be remanded to St. Clair County for trial.

Under no conceivable theory was petitioner entitled to his freedom.

He belongs either (a) in the Illinois Institution for the Criminally Insane as an unrestored lunatic; or (b) in the penitentiary as a person once insane but lawfully restored to sanity by administrative action and thereafter convicted and sentenced; or (c) in the county jail of St. Clair County, awaiting trial as a person lawfully adjudged insane but now found sane by a judgment of the District Court.

An important provision of United States *habeas corpus* legislation (Act of Feb. 5, 1867, Chap. 28, Sec. 1, 14 Stats. 385, as amended) is to be found in Title 28, U. S. C. A. as Section 461:

> "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, **and thereupon to dispose of the party as law and justice require.**"

This section has frequently been held to permit and require the district judge, where a petitioner is wrongfully in the custody of A, but belongs, not at large, but in the custody of B, to make orders appropriate to accomplish transfer of custody. In *Tod* v. *Waldman,* 266 U. S. 113, certain immigrants deemed by the immigration authorities to be ineligible to admittance into the United States were being held upon a judgment of deportation to the Secretary of Labor. The Circuit Court of Appeals and the Supreme Court of the United States were of the opinion that the proceedings culminating in the judgment of deportation were so defective as to be invalid and not to authorize deportation, but nevertheless held that the petitioners should be detained on other

process to await full, fair and proper inquiry into their eligibility for admittance.

This case is similar to the instant case in all material respects here. In both the cited case and the instant case, the petitioners were held on proceedings which were claimed to be defective. If it be assumed that in the instant case, as in the cited case, these proceedings were in fact defective and void, then in both cases the situation presented was one where the prisoner was detained upon unlawful process but was subject to detention upon different and lawful process.

In the cited case, the Supreme Court of the United States affirmed the decision of the Circuit Court of Appeals which contemplated, not that the petitioners should be set at liberty, but that they should be detained upon proper process. The court cited the statute above quoted in this brief.

In the case of *Copeland* v. *Archer,* 50 Fed. (2nd) 836, the Circuit Court of Appeals for the Ninth Circuit, finding the petitioner to be unlawfully held by the warden of the United States Penitentiary at MacNeil's Island in the State of Washington because the sentence of imprisonment was null and void but further finding that he was subject to a proper sentence of imprisonment, made an order appropriate to assure that petitioner would not be released but that he would be subject to the custody of proper authorities for transportation so that a proper sentence could be imposed and proper imprisonment could be accomplished.

In the case cited above, the order took the form of a direction to the warden to give ten days' notice to the proper authorities of the place and hour of his discharge, so that they might properly rearrest him. Had the Dis-

trict Court entered such an order in the instant case, petitioner could have been, as he should have been, returned to Illinois psychiatric confinement.

In *Andrus* v. *McCauley*, 21 Fed. Supp. 70, the District Court for the Eastern District of Washington, Southern Division, finding that a prisoner was detained upon a void sentence which was subject to a proper sentence, entered an order that the petitioner be "remanded to the custody of Kings County, Wash., to be taken before the state Superior Court in Kings County, and a sentence properly imposed."

It is clear beyond all argument that if, as respondent contends (see Point II, *ante*), the administrative action of Illinois authorities was sufficient to subject the petitioner to trial and conviction, he should be restored to the penitentiary but if, on the other hand, as petitioner's counsel will contend, petitioner's adjudication of lunacy was never legally vacated, then petitioner belongs in the Illinois psychiatric institution for the criminally insane. Upon no hypothesis consistent with the facts found by the trial court can the petitioner be deemed an adjudicated lunatic so that he could not validly have been convicted, and at the same time be deemed sane so that he is entitled to his absolute freedom.

It is therefore evident that this was certainly not one of the rare extraordinary ones of which the federal courts should, because of a palpable violation of the accused' rights, take jurisdiction when recourse to the state courts was not exhausted.

Petitioner's counsel is forced to the extremity of another dilemma. If we assume that administrative action was not sufficient legally to restore petitioner to sanity, then was or was not the fact that he had not been judi-

cially restored matter of record and knowledge upon petitioner's trial and conviction? If it was not matter of record in that case, it was not matter of fact judicially known to the court and *coram nobis* was appropriate. But if it was matter of record, then a writ of error was appropriate.

Conclusion.

It is earnestly submitted for the reasons urged in this brief that the judgment appealed from should be affirmed or, in the alternative, that a proper judgment should be entered by this court.

Respectfully submitted,

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